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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD V. McMILLAN, Plaintiff and Respondent, v. EXIR CO., INC., et al., Defendants and Appellants.	G051982, G051985 (Super. Ct. No. 30-2012-00564599) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Horn, Judge. Affirmed in part, reversed in part, and remanded with directions.

Greines, Martin, Stein & Richland, Robert A. Olson, David E. Hackett for Defendants and Appellants Exir Co., Inc., and Abraham Mourshaki.

Veatch Carlson and Cyril S. Czajkowskyj for Defendant and Appellant Exir Co., Inc.

Richard V. McMillan, in pro. per., for Plaintiff and Respondent.

* * *

Defendants Exir Co., Inc. (Exir) and its owner Abraham Mourshaki appeal from the judgment entered on the jury's verdict in favor of plaintiff Richard V. McMillan. Defendants argue the court erred in instructing the jury on res ipsa loquitur and private nuisance, plaintiff's damages expert testimony was insufficient to support the damages awarded, equitable relief was improper because plaintiff failed to join indispensable parties, and the judgment is misstated and fatally ambiguous in that it imposed liability against each defendant separately when it should have been jointly and severally.

We agree with defendants' last contention and remand the matter for a new trial on the issue of damages only. As a result, we need not address defendants' arguments regarding the misstated judgment or the insufficiency of plaintiff's expert evidence.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Exir, and Cecilia Lin (not a party to this action) own contiguous parcels of land on a slope above Williams Canyon Creek (creek), a natural stream bed flowing from east to west through plaintiff's property. Lin's property, which is at the highest level, slopes down to the Exir property, which in turn slopes down to plaintiff's property. As a result, surface water flows downhill in a northerly direction across the Lin, Exir, and plaintiff's properties and then into the creek. The creek runs to the north of the Exir property but is located on plaintiff's property. Plaintiff's property is burdened by a 40 feet wide easement that allows the Exir and Lin property owners to cross plaintiff's property.

Before Mourshaki purchased the Exir property, it had a "mild gradient of 2 percent," which would normally every year allow "the water to sheet flow across that property from a south to north direction, and then dump into the Williams Canyon

Creek." [1] For drainage, "[t]here was water from the sheet area and there was a small stream that ran parallel to the hillside there. . . . But the sheet water was the bulk of it." "[T]he sheet water actually distribut[ed] itself across the entire triangular piece of the Exir property on its way to Williams Canyon." "[T]he water would normally sheet off the [south] side . . . of the streambed."

Defendants acquired the Exir property in October 2007. Two weeks later, a brush fire destroyed structures on the Lin's and Exir's properties and "completely denuded" the vegetation on Lin's property. That December, abnormally heavy rain fell on the area, probably "two to three inches of rain" in "a brief period of time." Richard W. Zeiler, who had lived on or managed the property from 1991 until 2007, when Mourshaki took possession, could not say whether he had seen worse storms, only that "the volume of water was comparable to some of the storms [he's] witnessed before."

After the 2007 rains, the "Zahn Bridge still had the telephone poles across [on both sides] to keep people from going off."[2] The surface of the bridge had not yet washed away. Before Mourshaki purchased the property, Zeiler had never "seen water going across Zahn Bridge out of Grays Canyon," where the Lin's property is located.

Photographs taken after the rains showed the Exir property had been excavated, or "dug out a little bit more" because the water did not "sheet[] all the way across." Mourshaki opted not to stagger the hay bales provided to him, which would

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[1] Sheet flow means that "the water would come out of the canyon and just flow across the whole area as opposed to in one small spot." "[T]he water traffics off the rear of the canyon and it carries with it silt that literally fans out across that entire area."

[2] Apparently, the "Zahn" bridge crosses the creek at some point. We have been unable to determine its actual location from the record on appeal. Much of the examination of witnesses concerning the topography and other physical features of the land was conducted by counsel pointing at maps and photographs and asking questions of the witnesses about what was depicted on the documents. We have no record of what counsel was pointing at when asking the questions, and thus the responses are likewise uncertain.

have "slow[ed] down the water, give [the silt] a chance . . . to settle," and allowed it a chance to "slow down the water." The hay bales would have "interrupt[ed] the flow of water . . . and redirect[ed] it in another direction," and allowed "some control." Instead, Mourshaki placed the hay bales in a line, which "interrupt[ed] the flow of water . . . and redirect[ed] it in another direction." "[T]he water that normally would sheet flow down that hill [would] be collected behind the hale bays and end up" in another location. In fact, the hay bales were breached, with the water going "over the top[] after it backed up."

In January or February 2008, Exir's neighbor, Steven Ephland, used an excavator to dig a trench on Exir's property in order to channel "the water so that it simply is compelled to follow into the channel." He also excavated part of the creek bed.

Ephland told Lin that Mourshaki had asked him to dig the trench. When Lin's father went to ask Mourshaki about the trench, Mourshaki walked away but did not deny it. The trench was about five feet wide and three-to-four feet deep. Mourshaki placed rocks and dirt along the west side of the trench.

In March 2008, mudslides washed away the two water lines across the creek that serviced the Exir property. Without talking to plaintiff, Mourshaki replaced the water lines and added a third one outside of the recorded easement on plaintiff's property. Two-inch schedule 40 PVC pipes were run "from the meters crossing Williams Canyon Creek, and at [that] point, crossing [plaintiff's] property outside of the easement." PVC piping was also attached to a nearby telephone pole "as a means of giving support to the pipes."

Before 2008, the Exir property had no plateaus. It was "all graded 2 percent." After that year, the area was "significantly" different as to the grade. There were now "some plateaus in there, plains, combined with the fact that the soil . . . [was] in a cluster of small mounds and then parallel to the streambed the soil is built up probably three to five feet." The property was also terraced. A block wall also had been

built in the area behind the hay bales located along the south property line of the Exir property. The telephone poles supporting the bridge had vanished, as did seven oak trees growing on plaintiff's property immediately north of the Exir property. Also someone had "built a small barrier wall of masonry and stone" where the telephone poles used to be.

At the entry way "of the culverts underneath the bridge, someone [had] stacked stone." Previously when he lived there, Zeiler had never observed the "culvert[s] to become . . . overloaded due to the volume of water coming down out of the canyon." "Some of the culverts would become blocked to a certain degree but there's four culverts ["[f]our portals underneath the bridge"] so the water would always find an escape."

When Zeiler was living on the property, there was between 55 and 60 feet of land between the front porch of the lower house on the Exir property to the creek's south bank. Now, Zeiler estimated there to be "roughly 30, 35 feet." "[T]hat embankment has simply trafficked into the creek, water has carried it away." About eight to ten feet of the embankment had eroded since Mourshaki took possession.

From 1991 until Mourshaki purchased the property in 2007, the embankment had never changed and Zeiler had never seen water flow over the bridge. Nor had he ever seen heavily silted water following Williams Canyon Road go back into the creek. He also "never once" saw the drainage from the Exir property "cause erosion on [plaintiff's] property."

Heavy rain from 2008 to 2010 led to severe flooding in December 2010. The December 2010 flood was between at least a fifty-to-a-one-hundred-year flood.[3]

In Zeiler's opinion, the effects of the 2008 storm wreaked more havoc than the 2007 storm in that he had never before "seen water going over [plaintiff's] property in the area of the construction prior to December of 2008." Even before the 2008 storm,

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[3] A hundred-year flood refers to the storm intensity of a flood that happens only once in a hundred years.

Zeiler had noted the depth of the creek had "fanned out more [and] had eroded the banks."

In late December 2011 or early January 2012, Mourshaki hired neighboring property owner Sean Pandza to move dirt to protect his property from "[w]ater coming from the back hills."

In 2013, plaintiff requested George Hawes, a civil and geotechnical engineer, "to assess whether or not there had been some changes made to the [Exir] property that were adverse to [plaintiff's] property." Hawes observed "man made fill" that "changed the directions of the drainage." The fill redirected the natural flow of the water over to the east, as evidenced by erosion, such that it was not aligned with previous drainages and culverts and caused water to drain over the bridge instead of "being allowed to get into the" creek. Hawes also saw a concrete pad and a 286-foot concrete masonry unit wall encroaching on the southern boundary of plaintiff's property where it connects with the northern boundary of Exir's property.

Plaintiff sued Mourshaki and Exir for private nuisance and trespass, seeking compensatory and punitive damages, as well as equitable relief. Plaintiff alleged defendants created a private nuisance when they (1) added fill dirt to Exir's property, modifying the surface water flow onto plaintiff's property; and (2) "re-graded and modified the natural contours of the Exir property for the purpose of diverting . . . surface water run-off . . . on . . . the Exir property . . . and depositing the concentrated surface waters onto and upon [plaintiff's] property without taking into consideration the erosive effect of such surface waters which would run-off such 'improvements.'" Whenever the rains are sufficient, this "cause[s] the washing-out/erosion of portions of [plaintiff's] property and the creation of a gully preventing [p]laintiff's full use of his property." In his trespass claim, plaintiff alleged defendants poured a concrete slab that encroached onto his property and cut his trees without permission.

The jury rendered a special verdict in favor of plaintiff and against both defendants on the private nuisance claim, awarding the identical amount of $655,000 in damages against each defendant. It also awarded an identical $1,750 in trespass damages against each defendant.

After a bench trial on punitive damages, post-trial motions, and an award of equitable relief, the court entered a final judgment in favor of plaintiff as to liability, compensatory damages, and equitable relief, and in defendants' favor as to punitive damages. The trial court denied defendants' motions for a new trial.

DISCUSSION

Instructional Errors

Defendants contend two separate instructional errors require reversal of the judgment. First, defendants argue the res ipsa loquitur instruction should not have been given because an act of nature caused plaintiff's harm, and an act of nature is not under the control of defendant. Second, defendants assert that the CACI No. 2021 private nuisance instruction was incomplete and omitted a critical element of the private nuisance cause of action. We disagree with both arguments.

"'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.' [Citation.] The judgment may not be reversed on the basis of instructional error unless the error caused a miscarriage of justice. [Citation.] 'When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]' '"'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory

presented.’””” (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388 (*Baumgardner*).)

The Court Did Not Abuse Its Discretion by Instructing on the Res Ipsa Loquitur Doctrine

Res ipsa loquitur – Latin for “the thing speaks for itself” – is a doctrine affecting the burden of producing evidence arising from certain accidents. (*Baumgardner, supra*, 144 Cal.App.4th at p. 1388; Evid. Code, § 646, subd. (b).)[4] “Where the doctrine . . . applies, ‘[t]he presumed fact . . . is that “a proximate cause of the [plaintiff’s injury] was some negligent conduct on the part of the defendant . . . .”’” (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316.) In order for the doctrine to apply, “the plaintiff must present some substantial evidence of three conditions: (1) the injury must be the kind which ordinarily does not occur in the absence of someone’s negligence; (2) the injury was caused by an instrumentality in the exclusive control of the defendant; and (3) the injury was not due to any voluntary action or contribution on the part of the plaintiff.” (*Id.* at pp. 316-317; *Baumgardner, supra*, 144 Cal.App.4th at p. 1388.)

“The existence of one or more of these conditions is usually a question of fact for the jury. [Citations.] In a proper case, however, they all may exist as a matter of law.” (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 359.) But “where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur is present.” (*Roddiscraft, Inc. v. Skelton Logging Co*. (1963) 212 Cal.App.2d 784, 794.)

Defendants challenge only the second requirement. They argue acts of nature in the form of “periodic brush fires, ensuing heavy rains, and the December 2010 fifty-to-hundred-year-flood” were the necessary causes of plaintiff’s injuries and it cannot

[4] All statutory references are to the Evidence Code unless otherwise stated.

be said these were in defendants' exclusive control. In other words, they seek to have this court determine the issue of exclusive control as a matter of law.

"The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident." (*Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 443-444.)

Surprisingly (even disappointingly), the parties do not cite — much less discuss – section 646, the controlling California statute which (1) defines the nature of the res ipsa loquitur doctrine as applied in California, and (2) explains how the jury should be instructed when the evidence, as here, is conflicting, both with respect to the conditions giving rise to the presumption, and with respect to the ultimate issue of negligence.[5]

First, section 646, enacted in 1970, provides that the doctrine of res ipsa loquitur is merely a presumption affecting the burden of producing evidence. (§ 646, subd. (b).) "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and *without regard to the presumption*." (§ 604, italics added.)

Second, section 646 explains the jury's role when conflicting evidence is presented: "If the evidence, or facts otherwise established, would support a res ipsa

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[5] Plaintiff did not plead a cause of action for negligence. For that reason, CACI No. 417, the standard instruction on the res ipsa loquitur doctrine, was modified by essentially replacing the presumption of negligence with a presumption of unreasonable conduct. This modification of CACI No. 417 is not challenged on appeal.

loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, *and upon request shall, instruct the jury to the effect that*: [¶] (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and [¶] (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant." (§ 646, subd. (c), italics added.)

The California Law Revision Commission comment to section 646 explains how subdivision (c) of the statute is applied at trial when, as here, conflicting evidence is presented on the existence of the conditions giving rise to the res ipsa loquitur doctrine, and on the ultimate issue of negligence:

"The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

"In this situation, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. But the court shall also instruct the jury that it should not find that a proximate cause of the accident was some negligent conduct on the part of the defendant unless it believes, after weighing all of the evidence, that it is more probable than not that the defendant was

negligent and that the accident resulted from his negligence." (Cal. Law Revision Com. com., 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 646, p. 201.)

Once plaintiff asks for the res ipsa loquitur instruction, the trial court is required to give it, so long as substantial evidence exists to support it. (*Baumgardner, supra,* 144 Cal.App.4th at p. 1388.) Whether or not substantial evidence exists is a question of law. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515-1516.) We must review the evidence most favorably to plaintiff's contention that a res ipsa loquitur instruction was warranted. (*Baumgardner,* at p. 1388.) But even if the trial court erred, we will not reverse the judgment unless a verdict more favorable to the appealing party was reasonably probable in the absence of the error. (*Ibid.*)

We apply the above legal principles to the evidence in this case.

The basic facts of the res ipsa loquitur presumption were contested. In particular, plaintiff presented substantial evidence that defendants had altered the natural flow of the water, and that the alteration was the cause of plaintiff's damage. As the owners of the property, the alteration was under defendants' exclusive control. During the time that Zeiler had lived on or at the property from 1991 until Mourshaki purchased the property in 2007, he had "[n]ever once" seen water coming off "the upper pad and the upper house" cause erosion on plaintiff's property. He noticed changes occurring even before the December 2010 fifty-to-hundred-year flood. Plaintiff asserts on appeal that, "[w]ith the exception of [defendants' expert] and Mr. Mourshaki, all witnesses at trial testified that prior to [defendants'] alteration of Exir's property's drainage, the surface water run-off on the Exir's property had sheet flowed across the Exir property. Their testimony was that they had never seen surface water run-off flowing across the Zahn bridge and onto the north side of Williams Canyon Creek prior to [defendants'] alteration of the drainage of the Exir property." Defendants do not challenge this assertion. Under this view of the evidence, the instrumentality causing plaintiff's damage was the alteration of drainage on defendants' property.

On the other hand, defendants presented substantial evidence that an act of nature, especially the December 2010 flood, was the cause of plaintiff's damage. According to defendants' expert, the large volume of flood water caused a "high velocity flow going east to west through the creek" that caused erosion of the creek banks. The act of nature is obviously not in defendants' control. Under this view of the evidence, the instrumentality causing plaintiff's damage was the heavy rainfall.

But when the evidence bearing on any of the res ipsa loquitur conditions is contested, section 646, subdivision (c) teaches that it is the jury's role to decide whether the condition is satisfied, i.e., whether it may draw an inference that the alteration of the land (under defendants' sole control) was the cause of plaintiff's damage, or whether the heavy rainfall (not under defendants' control) was the cause of plaintiff's damage. Here, the jury was properly instructed with CACI No. 417. The instruction accurately advises the jury that if conflicting evidence has been presented as to the cause of plaintiff's damage, the res ipsa loquitur presumption vanishes, and the jury must weigh all of the evidence to determine whether liability has been established. In particular, the last two paragraphs of modified CACI No. 417 implement the requirements of section 646, subdivision (c). Thus, the jury was told: "If you decide that [plaintiff] proved all of [the res ipsa loquitur conditions], you may, but are not required to, find that [defendants] acted unreasonably or that [defendants'] unreasonable actions were a substantial factor in causing [plaintiff's] harm, or both. [¶] Defendants . . . contend that they acted reasonably and that their acts did not cause [plaintiff's] harm. If after weighing all of the evidence, you believe that it is more probable than not that [defendants] acted unreasonably and that their unreasonable acts were a substantial factor in causing [plaintiff's] harm, you must decide in favor of [plaintiff]. Otherwise, you must decide in favor of [defendants]."

The cases cited by defendants are inapposite as none of them applied section 646 with its presumption merely affecting the burden of producing evidence. The

only California case cited by defendants, *Carrick v. Pound* (1969) 276 Cal.App.2d 689, was decided before section 646 was enacted in 1970. The out-of-state cases followed their own state's application of the res ipsa loquitur doctrine. The jury was properly instructed with modified CACI No. 417.

CACI No. 2021, as Supplemented by Special Instruction No. 8, Properly Instructed the Jury on Private Nuisance

The court instructed the jury on the essential elements of plaintiff's private nuisance claim by using CACI No. 2021 as follows:

"[Plaintiff] claims that [defendants] interfered with his use and enjoyment of his land. To establish this claim, [plaintiff] must prove all of the following:

"1. That [plaintiff] owned the property;

"2. That [defendants], by acting or failing to act, created a condition or permitted a condition to exist that was an obstruction to the free use of property, so as to interfere with the uncomfortable enjoyment of life or property; or unlawfully obstructed the free passage or use, in the customary manner, of any street;

"3. That this condition interfered with [plaintiff's] use or enjoyment of his land;

"4. That [plaintiff] did not consent to [defendants'] conduct;

"5. That an ordinary person would be reasonably annoyed or disturbed by [defendants'] conduct;

"6. That [plaintiff] was harmed;

"7. That [defendants'] conduct was a substantial factor in causing [plaintiff's] harm; and

"8. That the seriousness of the harm outweighs the public benefit of [defendants'] conduct."

Citing *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, at pages 160-161 (*Wilson*), defendants contend this instruction "create[s] an inapplicable strict liability standard for private-nuisance waterflow claims" because it does not require a showing "the defendant's 'interference with the [plaintiff's] protected interest was *unreasonable*.'" Additionally, they argue CACI No. 2021 does not instruct the jury to consider whether the "'gravity of the harm outweighs the social utility of the defendant's conduct taking a number of factors into account.'"

Plaintiff initially responds that defendants' appellate challenge to CACI No. 2021 has been forfeited by defendants' failure to object to its use or to request additional instructions. In their reply brief, defendants claim they have already refuted this argument by asserting the instruction "*misstates* the law . . . and . . . *omits* critical elements." But although "failure to object to civil jury instructions will not be deemed a waiver where the instruction is prejudicially erroneous as given, that is which is an incorrect statement of the law[,] . . . a jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 760.)

Although defendants assert they are contending the instruction misstates the law, their actual complaint is that certain elements are missing, i.e., that the instruction is incomplete. By failing to object or to provide a qualifying instruction, defendants have forfeited their claim of instructional error with respect to CACI No. 2021.

Even if not forfeited, defendants' assertion that CACI No. 2021 imposes a "strict liability standard for private-nuisance claims" is also incorrect. Before liability for creating a private nuisance may be found, the final element of the instruction requires the jury to find that "the seriousness of the harm outweighs the public benefit of [defendants'] conduct." (CACI No. 2021.) In *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, our Supreme Court held that in a private nuisance claim, the alleged interference with a plaintiff's use and enjoyment of his land must be "'of such a

nature, duration or amount as to constitute unreasonable interference . . . .'" (*Id*. at p. 938.) "The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." (*Ibid*.) Thus, CACI No. 2021 does *not* impose strict liability for causing plaintiff a mere annoyance as defendant argues. The jury must find that the *degree* of the interference outweighs the social utility of defendants' conduct. We note that CACI No. 2021 uses the phrase "public benefit" rather than "social utility." While one may quibble with the substitution of "public benefit" for "social utility" in CACI No. 2021, it is nonetheless clear that the degree of interference must be weighed against the benefits of defendants' conduct, whether those benefits are described as "public benefits" or as the "social utility" of the conduct. Whichever phraseology is more appropriate, the essential truth is that CACI No. 2021 does not impose strict liability as defendants argue. Further, our Supreme Court has defined the weighing process embedded in CACI No. 2021 as "[t]he primary test for determining whether the invasion is unreasonable." (*San Diego Gas & Electric Co*., *supra*, 13 Cal.4th at p. 938.)

It is nonetheless true, however, that the *Wilson* court did find fault with CACI No. 2021. The *Wilson* court's concerns were addressed by the Judicial Council in 2015, the same year as *Wilson* was decided, when it adopted CACI No. 2022. But, perhaps unfortunately, the parties were in trial on this case about two years before CACI No. 2022 was published. In *Wilson*, the jury was instructed with CACI No. 2021 "that to find in favor of Wilson, it had to find that 'the seriousness of the harm [suffered by Wilson] outweighed the public benefit of Southern California Edison Company's conduct.' No instructions were given as to what factors the jury should consider in making this determination." (*Wilson, supra,* 234 Cal.App.4th at p. 160.) The *Wilson* court concluded "that additional instructions are required because without any guidance on the factors to consider, the jury cannot properly assess the seriousness of the harm or the public benefit." (*Ibid*.)

Although CACI No. 2022 was not yet available at the time of trial, the jury in this case was provided with additional instruction that gave guidance to the jury on what factors to consider in determining whether the seriousness of the harm to plaintiff outweighed the reasonableness of defendants' conduct. Special Instruction No. 8 stated: "When alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume and/or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage, a property owner, may be liable for that damage. The test is whether, under all the circumstances, the upper landowner's conduct was reasonable. This test requires consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures available to both upper and downstream owners. Those costs must be balanced against the magnitude of the potential for downstream damage. If both plaintiff and defendant have acted reasonably, the natural watercourse rule imposes the burden of stream-caused damage on the downstream property." (See *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337.)

Because Special Instruction No. 8 advised the jury of the factors they should consider in balancing the seriousness of the harm against the purpose for which defendants' improvements were undertaken and the reasonableness of defendants' conduct in the specific context of this case, no error occurred with regard to the giving of CACI No. 2021.

The Court Did Not Err in Granting Equitable Relief in the Absence of Lin and the County of Orange

The court granted equitable relief as a part of the judgment which essentially enjoined defendants from interfering with plaintiff's efforts to obtain

governmental approval for the restoration of a portion of Exir's property to "the contours as depicted in the topographical map prepared by James Brennan, Trial Exhibit number 36," and from interfering with plaintiff's efforts to execute those plans.

Defendants contend the court erred in granting plaintiff equitable relief because plaintiff failed to join two indispensable parties, Lin and the County of Orange. According to defendants, Lin is an indispensable party because her property drains through the Exir property toward plaintiff's property and "that such drainage is a matter of controversy," including in Lin's separate lawsuit against Exir over drainage and improvements. (*Lin v. Exir Co., Inc. et al.* (Super. Ct. Orange County, 2008, No. 30-2008-00109882.) Defendants claim the County of Orange is an indispensable party because it "must approve alterations to the grading in the area."

"'The determination of whether a party is necessary or indispensable is one in which the court "weighs 'factors of practical realities and other considerations.'"'" (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App.4th 1168, 1173.) Defendants do not dispute that the standard of review is abuse of discretion. But they contend the court did not "exercise its discretion within the limits of the governing law." We disagree.

In denying defendants' motion to dismiss plaintiff's equitable claims for failing to join indispensable parties, the court balanced plaintiff's right to have his property restored and protected from further erosion against the theoretical possibility the interests of a third party would be affected: "As far as the third party is concerned, I'm not sure that that's the defendant's concern at this point. The plaintiff's . . . property needs to be restored. If there is a third party's interest involved, that third party is going to have a say in it, have some recourse. [¶] The court is not going to issue an order that's going to interfere with some third party's property without that person having notice and the ability to be heard and dealt with. This court can deal with that enforcement of the equitable orders necessary down the road, and if it does impact the third party, they will

have to have notice and there will have to be some type of a hearing for the court to proceed." The court also noted that it would "retain jurisdiction after the judgment is signed and entered. Plaintiff can come back here if it is necessary, if there is a third party involved, we will deal with that accordingly." (See, e.g., *Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95 [court has inherent power to modify permanent injunction].)

Defendants assert the court's statement that it would deal with enforcement of the equitable orders later "if there is a third party's interest involved" "is a recognition that Lin and the County of Orange are, in fact, indispensable parties who had to be joined." Not so. In our view, it shows the court was not persuaded they were indispensable parties. Neither are we.

A party is an indispensable person "if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code Civ. Proc., § 389, subd. (a).)

Defendants rely on Code of Civil Procedure section 389, subdivision (a)(2), which "sets forth two prongs under which a party may be deemed necessary—(a)(2)(i) and (ii). But both prongs are subject to the same predicate condition: that the absent party '*claims* an interest relating to the subject of the action . . . .' . . . [U]nder subdivision (a)(2), merely *having* an interest is insufficient; instead, the absent party must affirmatively *claim* its interest. [In] *Hartenstine v. Superior Court* (1987) 196 Cal.App.3d 206, 222 . . . the court found that the State of California was not a necessary party because it did not claim an interest relating to the subject of the action. [A party

also] cannot claim an interest on [a third party's] behalf.'" (*Van Zant v. Apple Inc*. (2014) 229 Cal.App.4th 965, 974-975 (*Van Zant*).)

Neither Lin nor the County of Orange have claimed an interest in the subject of the current litigation. And defendants themselves state, the *Lin* action involved "drainage and improvements *related to the Lin and Exir* [p]roperties." Defendants have not cited any *evidence* in the record suggesting that Lin's rights will be affected by the equitable orders made in this case. Instead, defendants simply rely on an ipse dixit: "Reworking the drainage from Lin's property through the Exit Property to the McMillan Property necessarily impedes Lin's rights and interests." The recitation of a conclusion is not evidence.

Further, in objecting to plaintiff's proposed equitable relief orders, defendants acknowledged the *Lin* action had been settled. As plaintiff notes, "Lin has already been through litigation concerning [defendants'] interference with her easements rights and a final judgment has been entered which acts to prevent: ' . . . a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of . . .' her easement rights." (Code Civ. Proc., § 389, subd. (a)(2)(ii).) In light of these facts, defendants have not shown how they will "be open to conflicting equitable remedies in this and the *Lin* action" without joinder.

Defendants failed to show the court abused its discretion in implicitly concluding Lin and the County or Orange were not indispensable parties.

The Special Verdict and Judgment are Ambiguous

The special verdict and judgment awarded identical damages against Exir and Mourshaki severally. The parties agree that under the facts of this case any liability found by the jury should have been awarded against defendants jointly and severally, but they disagree on the remedy.

In the special verdict, the jury awarded identical damage amounts against each defendant, Mourshaki and Exir: $1,750 for trespass and $655,000 for private nuisance. But the special verdict form does not specify whether each defendant is jointly and severally liable for those amounts, or two separate but cumulative amounts. According to defendants, "[t]he verdicts rendered are hopelessly ambiguous. On the face of the verdict form, we don't know whether: (a) the jury intended to hold Defendants jointly and severally liable for $656,750; or (b) the jury intended to hold Defendants jointly and severally liable for a total of $1,313,500."

Plaintiff concedes this error but argues defendants forfeited their appellate challenge by not raising the issue in their motions for a new and different judgment and for new trial. To the contrary, in Mourshaki's motion to vacate the judgment, and for new trial, joined by Exir, defendants argued they "should be jointly and severally liable for . . . one, unitary amount" and that the jury had no evidentiary basis to "allocate between the two Defendants." The contention was not forfeited.

We also reject plaintiff's argument defendants had no right to appeal from a favorable error. Plaintiff reasons the special verdict was favorable to defendants because: "Immediately after the verdict was taken [counsel for both parties] spoke with two of the jurors and were told the jury had determined the damages, and in completing the verdict form awarded one half of the damages against each Appellant. The Jury was not instructed as to joint and several liability. The Jury found Respondent's damages were $1,310,000.00 [actually $1,313,500], and erroneously apportioned them between the two Appellants. In fact the award should have been $1,310,00.00 [actually, $1,313,500] joint and several, and this error favors each of the Appellants by $655,000.00 [actually $656,750]." But we cannot rely on hearsay statements by jurors, not even under oath, to explain the jury's reasoning. On the face of the record, it is equally possible that the jury intended to award only one-half of the amount plaintiff sought as the total harm he suffered and intended the award to be joint and several. We cannot be sure. And as

defendants point out, several liability means they "cannot seek indemnity from each other if plaintiff collects from either."

Plaintiff maintains it is logical to presume the jury accepted "Hawes's opinion that the cost to remediate Respondent's damages was $1,310,000 [actually $1,313,500], which the Jury then divided by two, $655,000 [actually $656,750], and entered such sum in each of the verdict forms. As to the Trespass Special Verdict form, the jury took . . . Hawes's testimony as the cost of remediation, $3,500.00, divided it by two and entered $1,750.00 on each form."

Plaintiff suggests the error may be remedied by amending the judgment to state defendants are jointly and severally liable for $1,313,500. But *Aynes v. Winans* (1948) 33 Cal.2d 206 precludes us from doing so. There, "[t]he jury returned separate verdicts independently assessing damages against the respective defendants, each in the sum of $5,000," when they should have been held jointly liable. (*Id.* at p. 207.) Because of the prejudicial nature of the separate judgments against each defendant, the Supreme Court held "the two judgments cannot stand as the measure of plaintiff's recovery herein." (*Id.* at p. 208.) "[T]here were two verdicts returned in the present case on separate forms as independent damage assessments . . . against each defendant, and there was no joint award against both defendants. Accordingly, such verdicts could not reasonably be regarded as authorizing an award of damages against defendant Winans in the sum of $10,000, nor did the trial court undertake to so construe them in concluding that they gave plaintiff 'a total judgment of $10,000.00' divided '$5,000.00 against each defendant.' Yet, as indicated, the record here discloses a situation where under defendant Winans might be compelled ultimately to pay both judgments — a damage recovery double the amount which the individual verdict and judgment against him would sustain — and the propriety of his complaint on that ground of prejudice cannot be disputed. [Citation.] For the foregoing reasons the judgments herein are reversed and the cause is

remanded for a new trial on the issue of damages alone in accordance with the views hereinabove expressed." (*Id.* at pp. 209-210.)

We are bound by this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The judgment is reversed and the cause remanded for a new trial on the issue of damages only.

Remaining Claims

Inasmuch as the matter is being remanded for a new trial on the issue of damages, we need not consider defendants' claims regarding the typographical error in the judgment or the sufficiency of the testimony by plaintiff's expert to support the amount of damages awarded.

DISPOSITION

The judgment is reversed and the cause is remanded for the purpose of a new trial on the issue of damages only. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.